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# Regulation and the Collapse of the New Deal Order, or How I Learned to Stop Worrying and Love the Market

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Regulation and the Collapse of the New Deal Order  
or  
How I Learned to Stop Worrying and Love the Market

Reuel Schiller\*

DRAFT – PLEASE DO NOT CITE OR CIRCULATE WITHOUT PERMISSION OF THE  
AUTHOR

It is not your typical book on public administration that makes the best seller list and bears a cover blurb from the President of the United States. Indeed, *Reinventing Government: How the Entrepreneurial Spirit is Transforming Government* may be the only such book. Written by David Osborne, a public policy analyst, and Ted Gaebler, a professional city manager, *Reinventing Government* spent eight weeks as a *New York Times* best seller in the spring of 1992. It was Bill Clinton who was quoted on the cover of first paperback edition, released less than two weeks after his inauguration: “Should be read by every elected official in America. This book gives us the blueprint.”<sup>1</sup>

*Reinventing Government* was an influential book. Its prescriptions provided the framework for the Democratic Party’s attempts to reform the federal administrative apparatus in the 1990s. The book’s basic policy commitments – a reconceptualization of citizens as consumers, the use of market mechanisms in place of governmental directives, and the

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\* The Honorable Roger J. Traynor Chair & Professor of Law, University of California, Hastings College of the Law. Versions of this paper were presented at the Bay Area Administrative Law Scholars meeting and, of course, at the Beyond the New Deal Order conference at the Center for the Study of Work, Labor, and Democracy at the University of California, Santa Barbara. My thanks to the organizers of each of these events: Michael Asimow, Anne Joseph O’Connell and Jodi Short for the BAALS and Nelson Lichtenstein and Alice O’Connor at UCSB. My thanks also to Mark Eggerman, Ethan Leib, Jeremy Kessler, Dave Owen, and Jodi Short for their thoughtful comments on this paper.

<sup>1</sup> For Bill Clinton’s blurb, see the 1993 paperback edition of David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (New York: Plume, 1993). All the references in this chapter are to the hardcover edition, published in 1992 by Addison-Wesley. That edition was on the *New York Times* best seller list for seven weeks from April 12, 1992 to May 24<sup>th</sup>, 1992. It peaked at number 8. For an archive of *New York Times* best sellers, see <http://www.hawes.com/pastlist.htm>.

substitution of private institutions for state actors – came to define what the post-New Deal regulatory order aspired to.<sup>2</sup> These ideas represented an abandonment of the basic premises of regulation that stemmed from the New Deal. Gone was a commitment to policy created by federal experts. Gone was a suspicion of the ability of the free market to successfully structure the American economy. Indeed, in many instances, gone was the idea that government should act as a countervailing force to markets at all.

This chapter will examine the emergence of this new, post-New Deal conception of the role of the administrative state, often called “The New Governance.”<sup>3</sup> I will first describe the policy premises of the New Deal administrative state and contrast them with the underlying assumptions of the New Governance. In doing so, I will explain how the ideas that permeated the New Governance shaped regulatory policy in the 1990s and 2000s. I will then explore the reasons for the rise of this new conception of the administrative state. In particular, I will demonstrate that the New Governance had its origins not only in conservative attacks on the premises of the New Deal Order, but also from the left’s powerful critique of the postwar liberal state.

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<sup>2</sup> The vision of regulation that I will discuss in detail are frequently given the moniker “neoliberalism.” I have declined to do so in this chapter. I have made this choice because the word is too often used to avoid defining the specifics of what was happening in fin-de-siècle politics and political culture, kind of like a bedspread thrown over an unmade bed. The goal of this chapter is to describe the specific elements of regulatory thought and action at the end of the century. I will leave it to others to place these elements within a broader definition of neoliberalism.

<sup>3</sup> I recognize that there is a very broad range of scholars and policy-makers whose work might be placed within the category of the New Governance. Not all of this work has the focus on market mechanisms that characterizes the material that this chapter will discuss. See, for example, Charles F. Sabel and William H. Simon, “Minimalism and Experimentalism in the Administrative State,” *Georgetown Law Journal* 100 (2011): 53.

If you had to pick a single document to encapsulate the New Deal's vision of the administrative state, the obvious choice would be James Landis' 1938 book, *The Administrative Process*.<sup>4</sup> Landis – the Dean of Harvard Law School who had drafted the New Deal's securities legislation and had chaired the Securities and Exchange Commission<sup>5</sup> -- wrote the *Administrative Process* as a full-throated defense of the administrative state at a time when the New Deal's political opponents were regaining sufficient political strength to attack some of its fundamental assumptions. As such, it forcefully articulated the two main premises of New Deal regulation: First, the Depression demonstrated that a society could not depend on market mechanisms to ensure a stable, productive economy. Second, as a consequence of that fact, the federal government had to establish an administrative apparatus, staffed by experts, to manage economic matters.

According to Landis, the rise of an industrial, technologically advanced society marked the end of a time when free markets could be expected to meet the needs of the members of that society. "A world that . . . could listen to Wordsworth's denunciation of railroads because their building despoiled the beauty of his northern landscapes is different, very different, from one that in 1938 has to determine lanes and flight levels for air traffic."<sup>6</sup> In such a context, "laissez-faire – the simple belief that only good could come by giving economic forces free play – came to an

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<sup>4</sup> James M. Landis, *The Administrative Process* (New Haven: Yale University Press, 1938). For a more detailed discussion of the premises of New Deal Administration, see Reuel Schiller, "The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law," *Michigan Law Review* 106 (2007): 399, 413-21.

<sup>5</sup> For biographical information on James Landis see Justin O'Brien, *The Triumph, Tragedy and Lost Legacy of James M. Landis: A Life on Fire* (Oxford: Hart Publishing, 2014); Thomas K. McCraw, *Prophets of Regulation* (Cambridge, Ma.: Harvard University Press, 1984), 153-209; and Donald A. Ritchie, *James M. Landis: Dean of the Regulators* (Cambridge, Ma.: Harvard University Press, 1980).

<sup>6</sup> Landis, *The Administrative Process*, 7.

end.”<sup>7</sup> Indeed, according to Landis, a belief in the efficacy of markets was so obsolete by the 1930s that he wrote merely of its “remnants.”<sup>8</sup>

Many of Landis’s fellow New Dealers were even blunter. Market mechanisms might have worked to ensure a productive economy in the nineteenth-century world of small businesses, but the Depression had revealed, in the words of Jerome Frank, “a new economic epoch” in which giant corporations were not subject to the traditional constraints of competition.<sup>9</sup> The most detailed description of this phenomenon was in Adolph Berle and Gardner Means’s 1932 book, *The Modern Corporation and Private Property*,<sup>10</sup> but this rejection of the laissez-faire assumptions of classical economics was central to the thinking of most New Dealers. “The jig is up,” wrote Rex Tugwell. “The cat is out of the bag. There is no invisible hand. There never was. If the depression has not taught us that, we are incapable of education.”<sup>11</sup> Landis’ mentor, Felix Frankfurter, agreed. “We have been assuming a continuing vitality for the economic theories of pioneer America while fact has been steadily undermining theory.”<sup>12</sup>

Having identified mindless obeisance to outdated notions of capitalism as the problem behind the Depression, Landis and other intellectuals within the Roosevelt administration set about devising solutions. Expert administration, Landis believed, was the key. It was the only possible way for government to regulate the modern economy effectively:

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<sup>7</sup> Id., 8.

<sup>8</sup> Id., 10.

<sup>9</sup> Jerome Frank, Book Review of Adolph A. Berle and Gardner C. Means, *The Modern Corporation and Private Property*, Yale Law Journal 42 (1933): 989.

<sup>10</sup> Adolph A. Berle and Gardner C. Means, *The Modern Corporation and Private Property* (rev. edition, New York: Harcourt Brace, 1968) (1932). The failure of markets is the theme of this entire book. For a particularly good passage see page 308.

<sup>11</sup> Rexford G. Tugwell, *The Battle for Democracy* (New York: Columbia University Press, 1935), 14

<sup>12</sup> Felix Frankfurter, “What We Confront in American Life,” in Archibald MacLeish and E. F. Prichard, Jr., eds., *Law and Politics: The Occasional Papers of Felix Frankfurter, 1913-1938* (New York: Harcourt, Brace, 1939), 336.

With the rise of regulation, the need for expertness became dominant; for the art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy.<sup>13</sup>

Book after book written by New Deal policy-makers and intellectuals sang the praises of expert planners.<sup>14</sup> The governmental process, Frankfurter wrote, was no longer a place for amateurs:

"Compelled to grapple with a world more and more dominated by technological forces, government must have at its disposal the resources of training and capacity equipped to understand and deal with the complicated issues to which these technological forces give rise."<sup>15</sup> Indeed, government without expertise was a recipe for demagoguery. Only "quiet, detached" experts could separate "facts from fiction" and determine "what [was] proof and what surmise." This process would generate a politics designed "to reach the mind rather than to exploit feeling."<sup>16</sup>

There was never any question among New Dealers that locus of much of this policy-making expertise would be the federal government and that agencies would exercise "that full ambit of authority necessary . . . to plan, to promote, and to police. . . ."<sup>17</sup> American economic institutions were so large that only regulatory agencies with a similarly vast scope could possibly be up to the task of managing them. Consequently, Landis and other New Deal policy-makers envisioned a concentration of power in federal administrative agencies that would regulate from

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<sup>13</sup> Landis, *The Administrative Process*, 15.

<sup>14</sup> In addition to Berle and Means and Landis, see Henry Wallace, *New Frontiers: A Study of the Mind of American and What Lays Ahead* (New York: Reynal & Hitchcock, 1934); Tugwell, *The Battle for Democracy*; Rexford G. Tugwell, *The Industrial Discipline and the Governmental Arts* (New York: Columbia University Press, 1933); and Felix Frankfurter, *The Public and Its Government* (New Haven, Ct.: Yale University Press, 1930).

<sup>15</sup> Frankfurter, *The Public and Its Government*, 151.

<sup>16</sup> *Id.*, 153.

<sup>17</sup> Landis, *The Administrative Process*, 17.

the top down (“like a trusted private executive,” Tugwell wrote) to ensure that both specific industries could be controlled and that issues that transcended individual industries could be addressed.<sup>18</sup>

Written after the demise of the New Deal Order, *Reinventing Government* had a very different take on the efficacy of markets and the role of government. The book’s premise was that the bureaucratic government established during the New Deal was broken. It was inefficient, expensive, and unable to carry out the basic functions that people demanded of it. This had happened because the American state was trying to use top-down, bureaucratized, New Deal models of governance in a society that was too complex to be governed in such a fashion. Yet another “new epoch” had dawned.

The solution to this problem was not mindless deregulation. Osborne and Gaebler understood the lessons of the Great Depression. Society had become too complex for the night watchman state. That is why both public and private bureaucracies developed. Society, however, did not stop developing once the twentieth-century administrative state was in place. Instead, change continued. Indeed, it sped up. National markets became global markets. Consumer choices multiplied. Business structures changed. Information coursed through new channels. According to Osborne and Gaebler, by the 1970s, America had arrived at a point of crisis similar to the 1930s: the bureaucratic state that had developed during the first two-thirds of the twentieth century was completely out of step with the economic and social reality of modern America.<sup>19</sup> The solution to this problem was to reinvent government, eschewing both the nihilistic libertarianism of the right and the myopic commitment to bureaucracy of the left.

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<sup>18</sup> Landis, *Administrative Process*, 14-17; Rexford G. Tugwell, “The Ideas behind the New Deal,” *New York Times Magazine*, July 16<sup>th</sup>, 1933, 1.

<sup>19</sup> Id., 12-16

Osborne and Gaebler's suggestions for reinvention have become commonplace in today's policy world. The state was to adopt the nostrums of 1980s management consulting. It was to achieve "Total Quality Management" by calculating return on investment for government programs. Citizens should be viewed as "consumers" of government services. Front line workers should be empowered, bureaucratic hierarchies destroyed. Hard, coercive enforcement of regulations should be replaced with cooperative, collaborative implementation. Most significantly, market mechanisms should be introduced into the governmental process as much as possible. The state should adopt market-driven approaches for both service provision and regulation. It should use more flexible private actors to carry out state functions when possible, or at least compete with those actors so as to reduce cost and increase efficiency. The state should enter the market to replace revenue streams that would traditionally have come from taxes. Tax and spend should become earn and incentivize.

*Reinventing Government's* tremendous influence stemmed from the fact that it became the must read book within the Clinton administration. Days after taking office, Clinton asked his Vice President, Al Gore, lead a "National Performance Review" (NPR) in order "reinvent government."<sup>20</sup> Osborne was the "intellectual guidepost" the project, known as "REGO."<sup>21</sup> Within 180 days the NPR produced its recommendations (*From Red Tape to Results*), and by the

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<sup>20</sup> The National Performance Review released three major reports: *From Red Tape to Results: Creating a Government that Works Better and Costs Less*, (Washington, D.C.: U.S. Government Printing Office, 1993); *Putting Customers First: Standards for Serving the American People* (Washington, D.C.: U.S. Government Printing Office, 1994); and *Common Sense Government: Works Better and Costs Less* (Washington, D.C.: U.S. Government Printing Office, 1995). For the history of the National Performance Review, see *Common Sense Government*, 1. The library of the University of North Texas maintains and excellent digital archive of NPR materials. <http://govinfo.library.unt.edu/npr/library/status/ex.sum.html>. This includes a brief history of the NPR. <http://govinfo.library.unt.edu/npr/library/papers/bkgrd/brief.html>.

<sup>21</sup> John Kamensky, "The U.S. Reform Experience: The National Performance Review," <http://govinfo.library.unt.edu/npr/library/papers/bkgrd/kamensky.html>. Kamensky was the Assistant to the Deputy Director of Management of the Office of Management and Budget during the Clinton administration. As such, he oversaw the REGO project.



end of 1995, the administration was ready to declare victory, though consistent with the rhetoric of dynamic change that permeated the policy dialogue, no one was gauche enough to suggest that the project was done.

Many of the recommendations were only tangentially related to new modes of governance. Some simply read like a rejiggering of substantive policy preferences (or a shift in interest group power that came with a change in political control of the White House): “End Wool and Mohair Subsidy,” “Increase Access to Capital for Minority Businesses.”<sup>22</sup> Others were anodyne procedural or institutional changes designed to promote efficiency that would have been equally pleasing to New Dealers and late twentieth century reformers: “Create a Single Point of Contact for Program and Grant Information,” “Automate Processing of ERISA Annual Financial Reports.”<sup>23</sup> Many recommendations, however, sought to implement the tenets of New Governance that went beyond a simple and uncontroversial preference for a streamlined bureaucracy. One manifestation of this was a change in vocabulary that was, presumably, meant to reflect a change in mindset. Many programs were to be “reinvented.”<sup>24</sup> All programs were supposed to become responsive and “customer-driven.”<sup>25</sup> Indeed, the word “customers” replaced words such as “citizens,” “beneficiaries,” or “persons” that might have appeared in a more traditional government document.<sup>26</sup>

This focus on consumers had a substantive dimension as well. The NPR’s recommendations reconceptualized many programs, demanding that they produce revenues like

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<sup>22</sup> *From Red Tape to Results*, 134, 136.

<sup>23</sup> *Id.*, 137, 146.

<sup>24</sup> The introduction to the NPR’s first report detailed how agencies were asked to “create Reinvention Teams” and “Reinvention Laboratories.”, *id.*, i.

<sup>25</sup> *Id.*, 140.

<sup>26</sup> NPR’s second report was entitled *Putting Customers First: Standards for Serving the American People*.

a business. Thus, national parks should be run in an “entrepreneurial” fashion.<sup>27</sup> Similarly, rather than funding its activities out of general revenue, the federal government should charge fees for particular services it provides, from air traffic control to veterans’ hospitals.<sup>28</sup> Other service provision should be rendered more efficient through public/private competition or simply through outsourcing. Be it the Department of Defense, NASA, the Bureau of Prisons, the Civil Conservation Corps, the Department of Energy, or the Department of Housing and Urban Development, the discipline of the market would reinvent administration, slashing or eliminating bureaucracy, improving customer experiences, and preserving the public fisc.<sup>29</sup>

The NPR’s recommendations were not limited to agencies that distributed specific government benefits. They also embraced the regulatory activities of the federal government. First of all, the NPR recommended, tentatively, market-based forms of regulation that would become all the rage in the early years of the new millennium.<sup>30</sup> The primary regulatory innovation that it promoted, however, was collaborative, “softer” methods of regulatory enforcement. Negotiated rulemaking, alternative dispute resolution, and “self-inspections” should replace traditional, top down, command, inspect, and punish methods of regulatory enforcement. This was particularly prevalent in the NPR’s recommendations for the Department of Labor, the agency frequently held up as the paradigmatic agency in need of reinvention.<sup>31</sup> But

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<sup>27</sup> *From Red Tape to Results*, 143.

<sup>28</sup> *Id.*, 150 (air traffic control), 153 (Veterans administration). See also, 135 (fisheries), 136 (Department of Defense), 137 (Department of Energy), 141 (Food and Drug Administration), 146 (Department of Labor), and 148 (Small Business Administration).

<sup>29</sup> *Id.*, 135 (Department of Commerce), 136 (Department of Defense), 138 (Department of Energy), 139 (Environmental Protection Agency), 142 (Department of Housing and Urban Development), 145 (Bureau of Prisons), 146 (Civilian Conservation Corps), 147 (NASA).

<sup>30</sup> *Id.*, 139 (“EPA should work with Congress to propose language amending the Clean Water Act to explicitly encourage market-based approaches to reduce water pollution.”) For contemporary examples of the proliferation of this type of regulation, see notes 38, 39, 40.

<sup>31</sup> *Id.*, 146

the Department of Transportation and the Internal Revenue Service were also targeted for this type of reform.<sup>32</sup>

This commitment to the mechanisms of New Governance was not a one-time thing limited to the Clinton administration. Many of these reforms – market-based service provision, regulatory flexibility, revenue-generating, entrepreneurial government, public/private partnerships – had become quite common in states and localities throughout the 1980s.<sup>33</sup> The very same document that crowed about the successes of the first round of REGO proposed much more of the same.<sup>34</sup> Flexible, collaborative enforcement mechanisms were used with increasing frequency in the 1990s and 2000s, particularly at the U.S. Department of Labor, the Occupational Safety and Health Administration, the Environmental Protection Agency, and the U.S. Department of Agriculture.<sup>35</sup> Similarly, New Governance’s calls for examining the “return on investment” of government programs was put into effect by the vigorous and widespread adoption of cost/benefit measures into the very structure of the administrative state. Executive Orders promulgated by Ronald Reagan, and enthusiastically continued by every subsequent

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<sup>32</sup> Id., 149, 152.

<sup>33</sup> Descriptions of the use of these mechanisms in state and local government are the primary focus of *Reinventing Government*. “As we researched [*Reinventing Government*],” Osborne and Gaebler wrote, “we were astounded by the degree of change taking place in our cities, counties, states, and school districts.” *Reinventing Government*, xxii. Gaebler himself was a city manager.

<sup>34</sup> *Common Sense Government*, 119-43.

<sup>35</sup> For these specific examples see, Orley Lobel, “The Renew Deal. The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought,” *Minn. L. Rev.* 89 (2005-2005): 410-15 (Department of Labor), 415-19 (Occupational Safety and Health Administration), 424-32 (Environmental Protection Agency); and Beryl A. Radin, et al., *New Governance for Rural America: Creating Intergovernmental Relationships* (Lawrence, Ks.: University of Kansas Press, 1996). For an encyclopedic list of New Governance initiatives across dozens of policy areas, see Lester M. Salamon, ed., *The Tools of Government: A Guide to the New Governance* (Oxford: Oxford University Press, 2002).

administration regardless of party, required that cost/benefit analysis be conducted on every significant federal regulation.<sup>36</sup>

The idea that the provision of government services should be reconceptualized as a market-driven process had also become commonplace by the beginning of the twenty-first century. Debates about education policy, for example, sought to improve school performance by explicitly invoking markets through “school choice” policies such as vouchers, charter schools, and No Child Left Behind’s right of parents to remove their children from underperforming schools.<sup>37</sup> The 1990s also saw market mechanisms introduced into regulation of traditional communications technology and the internet,<sup>38</sup> and, in the early twenty-first century, the Affordable Care Act was premised on the idea that the key to achieving universal health coverage and reducing its cost was to create marketplaces for healthcare and then force people to buy from them.<sup>39</sup>

Furthermore, each of these methods of providing government benefits through the market was designed to have a regulatory effect as well as a distributional one. Not only did creating a market in health insurance or schools result in the most efficient distribution of these public

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<sup>36</sup> For the extensive and continuing use of executive orders mandating presidential control of rulemaking, see Elena Kagan, “Presidential Administration,” *Harvard Law Review* 114 (2001): 2246, 2277-81, 2285-2290. For specific cost benefit requirements, see Executive Order 12291 (February 17, 1981), sections 2(b), 3(d); Executive Order 12866 (October 4, 1993), section 1(b)(6). See also Cass R. Sunstein, *Valuing Life: Humanizing the Regulatory State* (Chicago: University of Chicago Press, 2014). the 1980s. For an intellectual history of the use of cost/benefit analysis from the Regan-era to the present, see Jeremy K. Kessler and David E. Pozen, “Working Themselves Impure: A Life Cycle Theory of Legal Theories,” *University of Chicago Law Review* (forthcoming), 140-49.

<sup>37</sup> The No Child left Behind Act of 2001, Pub. Law No.107-110, 115 Stat. 1425 (2001), particularly Title V; Paul E. Peterson, ed., *The Future of School Choice* (Palo Alto, Ca.: Hoover Institution Press, 2003); Michael Mintrom, *Policy Entrepreneurs and School Choice* (Washington, D.C: Georgetown University Press, 2000).

<sup>38</sup> Communications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996); Lobel, “The Renew Deal,” 436-38; Thomas J. Duesterberg and Kenneth Gordon, *Competition and Deregulation in Telecommunications: The Case for a New Paradigm* (Indianapolis, In.: Hudson Institute Press, 1997).

<sup>39</sup> Patient Protection and Affordable Care Act, Pub. Law No. 11-148, 124 Stat. 119 (2010), particularly subtitle D.

goods, it also disciplined the actors in these markets in a manner that was more efficient than command and control regulation. Providers would conform to regulatory goals (student achievement requirements, for example) not because the government told them to, but because consumers/citizens would not chose their product if they do not.

This idea that markets could substitute for direct government action as a mechanism to achieve a regulatory end arose in other policy areas as well. The most obvious was environmental protection, where state and federal actors increasingly employed emissions trading markets to reduce pollutants and greenhouse gases.<sup>40</sup> Container deposit laws also sought to harness market mechanisms to reduce solid waste. More generally, the end of the twentieth century and the beginning of the twenty-first century saw a massive growth of disclosure requirements, often as a substitute for enforceable substantive regulatory requirements. The number of public policy problems that policymakers sought to solve through disclosure in the 1990s and the 2000s is too numerous to count: securities regulation, consumer regulation in every possible product area from children's toys to healthcare, internet privacy, public health, real estate transactions.<sup>41</sup> Indeed, cost/benefit analysis, traditionally a *bête noir* of the left, was embraced across the political spectrum with very little controversy as liberals reconceptualized it as an element of the ideal disclosure regime.<sup>42</sup> Thus, the most common regulatory strategy of the new millennium was based on the presumption that fully-informed consumers would make choices in the market that punished businesses that did not meet aspirational, non-enforceable

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<sup>40</sup> See, for example, Salamon, *Tools of Government*, 255-56, 267-68, 279; and Roger K. Raufer and Stephen L. Feldman, *Acid Rain and Emissions Trading: Implementing a Market Approach to Pollution Control* (New York: Rowan and Littlefield, 1987).

<sup>41</sup> Omri Ben-Shahar and Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton, N.J.: Princeton University Press, 2014).

<sup>42</sup> Kessler and Pozen, "Working Themselves Impure," 140-49.

regulatory goals. Indeed, in the tech utopian fringes of the modern economy, disclosure plus the massive information spreading potential of digital technologies was thought to eliminate the need for any government regulation at all.<sup>43</sup>

Of course, this sort of market-based regulation and the other mechanisms of the New Governance did not entirely replace more traditional bureaucracies and command and control regulation. They did, however, have a profound effect on the contours of the American regulatory state. Since the 1990s, they have been implemented with increasing frequency. Additionally, policies associated with New Governance have come to dominate the debate about how to form and reform the administrative state. It will be a long time before the instruments of state that were created during the New Deal disappear, if they ever do. But the ideas that underlay them -- that experts should craft policy, that markets cannot be trusted to promote the public good, that the state should counterbalance the power of private actors -- seem increasingly quaint in the current debates over regulation.

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This dramatic transformation of the assumptions underlying public administration and the role of the state gives rise to a question of causation. Landis' take on the administrative state represented the full flowering of the New Deal's infatuation with market skepticism, expertise, and top-down planning. That commitment would wane in the years immediately after World War II. Yet even this modified, postwar vision of regulation assumed a role for the

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<sup>43</sup> One of the most passionate proponents of this view is Arun Sundararajan. Sundararajan, *The Sharing Economy: The End of Employment and the Rise of Cloud-Based Capitalism* (Cambridge, Ma.: MIT Press, 2016), 131-58.

administrative state that was large, suffused with expertise-based authority, and suspicious of markets. Today, even within progressive policy circles, these attributes are disparaged. Why did this sea change in thought and action occur?

One answer to this question is politics. The vast majority of New Governance's proponents were associated with the Democratic Party. They used New Governance ideas to protect the administrative state from attacks from the political right. Faced with the anti-statist, deregulatory political culture of Reagan-era America, New Governance advocates sought to preserve the state by making it more efficient. While they might use typical right-wing shibboleths to attack governmental inefficiencies (\$12,000 wrenches, bloated bureaucracies, rococo regulations),<sup>44</sup> they had little patience with actual right-wing blunderbuss deregulation. "A good doctor doesn't lop off a patient's arms and legs," Osborne wrote, ghosting for Gore in *Common Sense Government*, the NPR's third annual report.<sup>45</sup> "We don't want to get rid of government; we want it to work better and cost less."<sup>46</sup> Liberals, Osborne believed, should take hold of traditionally conservative ideas – the use of market mechanisms, cost/benefit analysis-- so they would be implemented in a manner that would promote intelligent, humane regulation. If Democrats could make the administrative state cheaper, more efficient, and more effective, then they could defang attacks on valued programs and ensure that progressive values were ensconced in the new, streamlined administrative state. Thus, one explanation for the emergence of the New Governance is that it was a rearguard action against the successes of Reagan-era

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<sup>44</sup> See, e.g. *Common Sense Government*, 39.

<sup>45</sup> *Id.*, 20.

<sup>46</sup> *Id.*, 5.

political ideology. It was political jujitsu in which liberals used conservative policy nostrums (shrinking government, cutting red tape) to further progressive ends.<sup>47</sup>

Another, compatible explanation is that the emergence of the New Governance was first and foremost a pragmatic response to the drastically reduced streams of government revenue that were, in turn, caused by deindustrialization and the tax revolts of the 1970s. Certainly the fingerprints of these two phenomena are all over Osborne and Gaebler's *Reinventing Government*. From the very beginning of the book, the authors disclaim any credit for inventing the various governance strategies they recount.<sup>48</sup> Instead, they portray themselves as chroniclers of the policy innovations they see occurring all around them. Every chapter is packed with charmingly told anecdotes of plucky public sector entrepreneurs reinventing government. Yet for all the New Governance literature's claims about the structural mismatch between contemporary top-down bureaucracies and dynamic, technology-driven society, most of the tales of innovation that form the basis of *Reinventing Government* stem from two things: the decay of America's urban core in the 1970s, and Americans' disinclination to pay taxes. It is no coincidence that many of the innovations that Osborne and Gaebler discussed – public/private partnerships, forcing governments to compete with private actors for the delivery of public services, the use of private sector performance indicators in the public context, flexible budgeting, public investment in private business ventures, user fees for government services -- occurred in California cities in the aftermath of Proposition 13.<sup>49</sup> Other examples were taken from cities like Newark, Tampa, Louisville, and Saint Paul that lost tax revenue as they

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<sup>47</sup> Stephen Skowronek calls this strategy the "Third Way." *The Politics Presidents Make: Leadership from John Adams to Bill Clinton*, Revised Edition (Cambridge, Ma.: Harvard University Press, 1997), 447-65.

<sup>48</sup> Osborne and Gaebler, *Reinventing Government*, xvii.

<sup>49</sup> *Id.*, 2-5, 119-21, 200, 236-41.



deindustrialized.<sup>50</sup> Still other examples are from Reagan-era federal programs – HUD and the National Parks system, for example, -- whose budgets had been sacrificed on the altar of supply side economics.<sup>51</sup> Viewed like this, the New Governance looks like a pragmatic response to rapidly declining public funding of the administrative state, not a conscious response to problems created by bureaucratic institutions out of touch with the reality of a modern society.

These two explanations for the rise of New Governance might be sufficient, but for one fact. Its proponents did not seem like they were dragged, kicking and screaming, into adopting these innovations. They did not grit their teeth and accept that shrinking revenues and Republican attacks on the administrative state required them to develop methods of accomplishing the state's functions without using traditional administrative mechanisms. To the contrary, the New Governance's progenitors were enthusiastic, indeed, almost messianic, in their commitment to the reinvention of the state. They were not making lemonade from lemons. They were promoting "American *Perestroika*."<sup>52</sup> Finding a "third way" of governing that cut the Gordian knot of ineffective government, a knot that was tied equally by liberal tax-and-spend bureaucrats and conservative budget-cutting government haters.<sup>53</sup> Tax revolts and the shrinking government fisc may have provided opportunities to change the nature of the administrative state, but those who sought to reinvent government were happy to jump at the chance.

In fact, by the 1980s, liberal thought had itself become permeated with opinions about the administrative state that suggested the need for a dramatic reconception of regulation. The ideological voyage that liberals took between 1938, when Landis wrote the *Administrative*

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<sup>50</sup> Id, 25-27, 29, 38-39, 50, 81, 108-09, 109-10, 149-50, 293-94.

<sup>51</sup> Id., 61, 64, 71, 88, 108-09, 113, 149, 152, 167.

<sup>52</sup> Id., 1.

<sup>53</sup> Skowronek, *The Politics Presidents Make*, 447-65.

*Process*, and the early 1990s, when Osborne and Gaebler wrote *Reinventing Government*, provided liberal policy-makers with a set of beliefs that suggested all the attributes of the New Governance -- a distrust of the state, a trust in markets to solve public policy problems, a belief that markets would promote democratic participation – represented the best, most progressive approach to administration. This change represents a third factor shaping the contours of liberal regulatory policy beyond the defensive adoption of Reagan-era political vocabulary and pragmatic responses to dramatically reduced government resources. It suggests that the antecedents of the New Governance can be found within the sincerely held reform commitments and beliefs of many on the left.

This shift from New Deal administrative ideology to the theories of regulation underlying what legal scholar Orley Lobel has called the “Renew Deal” took place gradually.<sup>54</sup> As historians who have studied the New Deal administrative state have demonstrated, the contours of that state as they emerged from World War Two were different from those that Landis portrayed in the *Administrative Process*.<sup>55</sup> Faced with vivid examples of totalitarian administrative behavior in Europe and the heavy hand of the domestic wartime state, American policy-makers stepped back from Landis’ extreme hostility towards the judiciary and his boundless affection for expertise. “Even if we grant . . . the magnificent accomplishments of the New Deal,” wrote Louis Jaffe, one of the era’s foremost administrative law scholars and a New Deal alum, “we cannot forget that our age has produced elsewhere, and even on occasion in our

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<sup>54</sup> Lobel, “The Renew Deal.”

<sup>55</sup> For discussions of the relationship between the administrative state and fears of totalitarianism in the years after World War II, see Anne Kornhauser, *Debating the American State: Liberal Anxieties and the New Leviathan, 1930-1970* (Philadelphia, Pa.: University of Pennsylvania Press, 2015); Joanna L. Grisinger, *The Unwieldy American State: Administrative Politics since the New Deal* (New York: Cambridge University Press, 2012); Reuel Schiller, “Reining-in the Administrative State: World War II and the Decline of Expert Administration” in Daniel Ernst and Victor Jew, eds., *Total War and the Law: New Perspectives on World War II* (Westport, Cn.: Praeger, 2003).

own country, the most monstrous expressions of administrative power.”<sup>56</sup> As a result, large chunks of the administrative state were judicialized in the years after the War. Judicial review of administrative action was formalized, and many of the institutions of the administrative state were required to comport themselves in a more judicial fashion. Agencies were supposed to behave more like courts than they had during the 1930s.

This is not say that the New Deal’s commitment to expertise and administrative autonomy was completely abandoned in the years following the War. Far from it. As the administrative state grew dramatically in the postwar period, courts showed due deference to agencies in their areas of expertise. Similarly, non-adjudicative agency actions, such as issuing regulations, were not subjected to the same court-like procedural requirements that became a staple of administrative adjudications. An equilibrium had been reached. People on the right had accepted the administrative state because it was subject to both reasonably thorough judicial review and added procedural requirements typified by the Administrative Procedure Act of 1946. Liberals, on the other hand, accepted judicial review and judicialization of parts of the administrative processes in order to justify a rapidly expanding administrative state designed to further their policy interests.<sup>57</sup>

By the 1960s, this compromise vision of the administrative state had come under attack, mostly from the political left.<sup>58</sup> In a political culture that increasingly emphasized the value of participatory democracy and individual liberty, the administrative state was viewed with

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<sup>56</sup> Louis L. Jaffe, *Judicial Control of Administrative Action* (Boston, Ma.: Little Brown, 1965), 344.

<sup>57</sup> Grisinger, *The Unwieldy State*, 59-108; George B. Shephard, “Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics,” *Northwestern Law Review* 90 (1996): 1557; Martin Shapiro, “APA: Past, Present and Future,” *Virginia Law Review* 72 (1986): 452-54.

<sup>58</sup> Paul Sabin, “Environmental Law and the End of the New Deal Order,” *Law and History Review* 33 (2015): 965; Reuel Schiller, “Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970,” *Vanderbilt Law Review* 53 (2000), 1390.

suspicion. Scholars and activists like Gabriel Kolko, Theodore Lowi, Charles Reich, and Ralph Nader suggested that agencies were captured by elite interests that used the administrative state to stifle competition and enrich themselves.<sup>59</sup> Indeed, by the mid-1960s, such views were commonplace among administrative law cognoscenti such as Jaffe, Kenneth Culp Davis, and Henry Friendly.<sup>60</sup> Indeed, even James Landis had a change of heart. In 1960, acting as a member of John F. Kennedy's transition team, Landis issued a scathing report on the federal administrative state that included concerns about agency capture.<sup>61</sup>

These thinkers frequently suggested that popular participation in the administrative process and the protection of individual rights were necessary to combat the scourge of agency capture. The most famous example of this thinking was Charles Reich's suggestion that government benefits be reconceptualized as property rights belonging to beneficiaries.<sup>62</sup> By viewing benefits this way, citizens could assert a panoply of procedural rights against the overbearing and corrupt agencies that he believed routinely trampled on people's individual liberties. Reich was joined by a host of less famous contemporaries – Joseph Sax, John Denvir,

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<sup>59</sup> Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916* (New York: Free Press, 1963); Theodore J. Lowi, *The End of Liberalism* (New York: Norton, 1969), particularly 288-89; Charles A. Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues," *Yale Law Journal* 74 (1965):1245; Charles A. Reich, "The Law of the Planned Society," *Yale Law Journal* 75 (1966): 1227; Charles A. Reich, "The New Property," *Yale Law Journal* 73 (1964):733. Nader's Center for the Study of Responsive Law published a series of monographs that were deeply skeptical about the ability of administrative agencies to further the public interest. See, Edward F. Cox, et al., *"The Nader Report" on the Federal Trade Commission* (New York: R.W. Barron, 1969); John C. Esposito, *The Vanishing Air* (New York: Grossman, 1970); Robert C. Fellmeth, *The Interstate Commerce Omission: The Public Interest and the ICC* (New York: Grossman, 1970); James S. Turner, *The Chemical Feast: Ralph Nader's Study Group Report on the Food and Drug Administration* (New York: Grossman, 1970).

<sup>60</sup> Louis L. Jaffe "The Citizen as Litigant in Public Law Actions," *University of Pennsylvania Law Review* 116 (1968): 1033; Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge, La.: Louisiana State University Press, 1969), 3, 24-25; Henry Friendly, *The Federal Administrative Agencies* (Cambridge, Ma.: Harvard University Press, 1962), 19-22.

<sup>61</sup> James M. Landis, *Report on Regulatory Agencies to the President-Elect* (Washington, D.C.: United States Government Printing Office, 1960)

<sup>62</sup> Charles Reich, "The New Property." Karen M. Tani, "*Flemming v. Nestor*: Anticommunism, the Welfare State, and the Making of 'New Property,'" *Law and History Review* 26 (2008): 379.

Robert Felmeth, David Sive, and Simon Lazerus, for example – who, acting as scholars and public interest lawyers, battled agencies that they claimed had abandoned the public interest in favor of either powerful interest groups or their own bureaucratic interests.<sup>63</sup>

This deep and abiding hostility towards the administrative state, and the enthusiastic endorsement of individual rights to be deployed against it had many real-world manifestations in the 1960s and 1970s. The most obvious were legislative initiatives that were designed to limit the power of administrative agencies while empowering individual citizens to contest agency actions. The Freedom of Information Act attempted to curtail agency arbitrariness by promoting transparency.<sup>64</sup> The new regulatory initiatives of the late 1960s and early 1970s (most of which involved environmental protection) included “citizen suit” provisions that allowed public interest litigators to monitor and sue agencies that were failing to live up to their statutory mandate.<sup>65</sup>

Additionally, administrative law itself changed in the 1960s and 1970s in a manner designed to curb agency power by promoting individual rights and public participation in the administrative process. Courts embraced an increasingly robust vision of administrative due process. They widened judicial “standing” thereby allowing a broader range of people to challenge administrative action.<sup>66</sup> They increased the intensity of judicial review so that this new cohort of litigants could demand increased judicial involvement in the administrative process. During the 1970s, courts proceduralized the administrative rulemaking process, a heretofore

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<sup>63</sup> Sabin, “Environmental Law and the End of the New Deal Order,” *Law and History Review* 33 (2015): 965; Reuel Schiller, “Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970,” *Vanderbilt Law Review* 53 (2000): 1416; Michael W. McCann, *Taking Reform Seriously: Perspectives on Public Interest Liberalism* (Ithaca, N.Y.: Cornell University Press, 1986), 106-21.

<sup>64</sup> Schiller, “Enlarging the Administrative Polity,” 1444-46; Michael Schudson, *The Rise of the Right to Know: Politics and the Culture of Transparency* (Cambridge, Ma.: Harvard University Press, 2015), 28-65.

<sup>65</sup> Schiller, “Enlarging the Administrative Polity,” 1146-50.

<sup>66</sup> *Id.*, 1435-42.

ignored aspect of agency action. Courts required increased public participation, responses to public criticisms, and detailed explanations of administrative action. They also conducted increasingly intense judicial review of the substance of the regulations that the rulemaking process produced.<sup>67</sup>

For anyone with even a passing familiarity with the political culture of the 1960s and 1970s, these trends are hardly surprising. There was no reason why the distrust of institutions that was endemic in the 1960s would bypass the administrative state. Likewise, bureaucratic institutions were unlikely to be exempted from the calls for participatory democracy that flowed from the Civil Rights Movement, the student movement, and the antiwar movement. Similarly, the increased judicialization of the administrative process and the emphasis on increasing judicial control of bureaucracy to protect individual rights were part and parcel of the lionization of the judiciary as an instrument of liberty protection that was common during the ascendancy of the Warren Court.<sup>68</sup>

This conception of the administrative state -- a flawed entity in need to close supervision by courts -- represented a step on the road to the “reinvented government” that would emerge by the century’s end. Reformers from both the 1960s and the 1990s mistrusted bureaucracy and

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<sup>67</sup> Reuel Schiller, “Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s,” *Administrative Law Review* 53 (2001): 1139.

<sup>68</sup> For the idea that distrust of traditional institutions was central to the ideology of 1960s reform, see Maurice Isserman and Michael Kazin, *American Divided: The Civil War of the 1960s* (New York: Oxford University Press, 2000), particularly chapters 8 and 9; James T. Patterson, *Grand Expectations The United States, 1945-1974* (New York: Oxford University Press, 1997), 442-57; Howard Brick, *Age of Contradiction: American Thought and Culture in the 1960s* (Ithaca, N.Y.: Cornell University Press, 1996), 124-45; David Burner, *Making Peace with the 60s* (Princeton, N.J.: Princeton University Press, 1996), 134-66; Maurice Isserman and Michael Kazin, “The Failure and Success of the New Radicalism,” in Steve Fraser and Gary Gerstle, *The Rise and Fall of the New Deal Order* (Princeton, N.J.: Princeton University Press, 1989) 212-24. Rebecca E. Klatch’s excellent *A Generation Divided: The New Left, The New Right, and the 1960s* (Berkeley, Ca.: University of California Press, 1999), demonstrates how this distrust permeated youth movements on both the left and the right. For the lionization of the Warren Court during this period, see Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven, C.t.: Yale University Press, 1996), 42-59.

both sought to empower individuals as they interacted with the state. There were, however, substantial differences. The 1960s vision of administration still imagined an autonomous public interest. It simply suggested that courts might be better vehicles for discovering it than agencies.

Nevertheless, these political, legal, and philosophical attacks on the administrative state had an effect beyond simply empowering courts. Because they emphatically asserted that the underlying mechanisms of regulation were flawed, they opened the door to a reconceptualization of how the regulatory apparatus should work. The legal liberal reformers of the 1960s believed the public interest could be furthered if the administrative state was subjected to increased public participation, increased proceduralization, and more intense judicial review. The next generation of reformers -- the observers of the administrative state in the 1970s and 1980s who would become the proponents of the New Governance -- saw things differently. According to them, legal liberal reforms and the doctrines they generated created the very problems that the New Governance would seek to address: a sclerotic administrative process in which regulatory innovation was crushed by bureaucratic inflexibility.

For example, many observers, often from the left, came to see the administrative due process revolution so forcefully advocated by Charles Reich, as a mixed blessing at best. Administrative hearings were supposed to ensure accurate outcomes while protecting the dignity of people who interacted with the administrative state. Yet, according to some critics, as courts required that administrative adjudications have more procedural mechanisms, they became soul crushing, dysfunctional nightmares that produced nothing more than inefficiency, delay, and the indignity of being processed through an unfeeling bureaucracy.<sup>69</sup>

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<sup>69</sup> The most outspoken proponent of this view was William H. Simon. See Simon, "Legality, Bureaucracy and Class in the Welfare System," *Yale Law Journal*, 92 (1983): 1198, and Simon, "Rights and Redistribution in the Welfare System," *Stanford Law Review* 38 (1986): 1431. See also, Jerry L. Mashaw, *Due Process and the Administrative State* (New Haven, Ct.: Yale University Press, 1985), 31-34; Daniel J. Baum, *The Welfare Family*

Similarly, by the 1980s, a consensus had emerged that the process by which administrative agencies issued regulations had become so burdened by intense judicial review and procedural requirements imposed by courts in the name of fairness and public participation that the regulatory process had become “ossified.” The process by which agencies issued regulations was so burdensome that needed regulations would be delayed for years. Even worse was the assertion that agencies simply stopped issuing regulations altogether, replacing them with less transparent modes of policy creation such as piecemeal adjudications or the promulgation of a plethora of “guidance documents” and “policy statements” that constituted an opaque, “secret” form of administrative authority. The irony was apparent. Judicial attempts to make the administrative process more just and more participatory had had the opposite effect.<sup>70</sup> Contemporary administrative law scholars debate whether overproceduralization and ossification are problems that actually exist. They also debate whether such problems are the result of the doctrinal innovations of the 1970s and 1980s. It is clear, however, that at the time many

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*and Administrative Justice* (New York: Praeger, 1974), 36-37. Many liberals remained committed to Reich’s ideas in theory, but bemoaned the ways that courts implemented them. See, Jerry L. Mashaw, “The Supreme Court’s Due Process Calculus for Administrative Adjudication in *Mathews v. Eldridge*: Three Factors in Search of a Theory of Value,” *University of Chicago Law Review* (1976): 28, 50; Edward L. Rubin, “Due Process and the Administrative State,” *California Law Review* 72 (1984): 1044; Gary Lawson, “Efficiency and Individualism,” *Duke Law Journal* 42 (1992): 53.

<sup>70</sup> The most famous statement of this problem is Thomas O. McGarity, “Some Thoughts on ‘Deossifying’ the Rulemaking Process,” *Duke Law Journal* 41 (1992): 1385, but there are many other examples: Mashaw, *Due Process and the Administrative State*, 23; Jerry L. Mashaw and David L. Harfst, *The Struggle for Auto Safety* (Cambridge, Ma.: Harvard University Press, 1990), 145-71; Antonin Scalia, “Back to Basics: Making Law without Making Rules,” *Regulation* (July/August 1981), 25-28. Even the Administrative Conference of the United States (ACUS), the government agency responsible for assessing the performance of the federal administrative apparatus, bemoaned the inefficiency of the rulemaking process brought about by intense judicial review and the judiciary’s insistence on the use of increased procedures during the rulemaking process. See Administrative Conference of the United States, Recommendation 93-4, “Improving the Environment for Agency Rulemaking, 59 Fed. Regis. 4670 (1994). Indeed, ACUS was bemoaning the overproceduralization of the rulemaking process as early as 1972. Administrative Conference of the United States, Recommendation 72-5, “Procedures for the Adoption of Rules of General Applicability,” 38 Fed. Regis. 19792 (1973).



observers believed them to be.<sup>71</sup> Thus, by the end of the 1980s, the court-driven reform of the administrative process so beloved by legal liberals was deemed a failure.

This failure left room for an entirely new set of prescriptions based on a different set of assumptions. New Dealers thought that agencies would further the public interest through the application of their expertise to public policy problems. The reformers of the 1960s and 1970s thought that the public interest could be implemented through a combination of public participation in the administrative process and intense judicial oversight of agency actions. For Osborne, Gaebler, and other New Governance devotees, fin-de-siècle assumptions about the administrative state deemphasized the idea of a public interest differentiated from the market. Often it seemed as if New Governance required every person to be his own regulator, discovering risks and reacting appropriately within the market. Government simply acted as market participant, peddling its vision of the public interest as just another product to be measured against alternatives.

Obviously, the vision was not incompatible with the conservative political and intellectual movement that emerged triumphant in the last third of the twentieth century. The demonization of the state and the valorization of individual economic liberties was central to the right's ideology and its political goals. Indeed, the American right engaged in a systematic intellectual campaign to promote a conception of political economy in which market mechanisms were as natural as gravity and as pervasive as air. New Deal regulation was premised on the

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<sup>71</sup> For a sample of the contemporary debate, see Jason Webb Yackee & Susan Webb Yackee, "Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990," *George Washington Law Review* 80 (2012): 144; and Richard J. Pierce, Jr., "Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis," *George Washington Law Review* 80 (2012): 1493. For views at the time, see ACUS Recommendation 72-5, "Procedures for the Adoption of Rules of General Applicability," 38 Fed. Regis. 19792 (1973) and Scalia, "Back to Basics: Making Law without Making Rules." The United States Supreme Court articulated this fear in *Vermont Yankee Nuclear Power Corp. v. Nation Resources Defense Council*, 435 U.S. 519 (1978).

notion that markets were creations of human political choices and thus could, and should, be shaped by those choices. By the 1980s, conservative political and intellectual successes had pushed such ideas out of the broad political discourse and back into relative obscurity of the academy.<sup>72</sup>

Yet it is too easy to simply attribute the rise of the New Governance to the triumph of Reaganism and its accompanying ideology. In fact, political conservatives were late adopters of New Governance nostrums. Their preferred approach to the administrative state was pure, unadulterated deregulation.<sup>73</sup> The proponents of the New Governance were, for the most part, Democrats trying to turn back the right's deregulatory excesses. Additionally, the actual philosophical and policy antecedents of the New Governance literature's various commitments – market mechanisms, disclosure, anti-hierarchical institutional structure, experimentalism, collaborative work environments, emphasis on the power of information, a great faith in digital technologies – are not found in the right wing's intellectual renaissance of the postwar period. Instead, their origins stem from a very different place: the 1960s left.

Consider, for example, the libertarian, individualist assumptions that underlay the New Governance. During the New Deal such beliefs belonged primarily in the province of conservatives who deployed them to challenge the Roosevelt Administration's novel regulatory

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<sup>72</sup> For an excellent discussion of the historical literature on twentieth-century conservatism, see Kim Phillips-Fine, "Conservatism: A State of the Field," *Journal of American History* (2011) 98 (3): 723-743. For postwar conservatism in particular, see Angus Burgin, *The Great Persuasion: Reinventing Free Markets Since the Depression* (Cambridge, Ma.: Harvard University Press, 2012) and Elizabeth Tandy Shermer, *Sunbelt Capitalism: Phoenix and the Transformation of American Politics* (Philadelphia, Pa.: University of Pennsylvania Press, 2013).

<sup>73</sup> For descriptions of Reagan-era deregulatory strategies, see Barry D. Friedman, *Regulation in the Reagan-Bush Era: The Eruption of Presidential Influence* (Pittsburgh: University of Pittsburgh Press, 1995); George C. Eads and Michael Fix, *The Reagan Regulatory Strategy: An Assessment* (Washington, D.C.: Urban Institute Press, 1984); Martha Dethrick and Paul J. Quirk, *The Politics of Deregulation* (Washington, D.C.: Brookings Institution Press, 1985).

initiatives. Over the course of the postwar period, however, liberals came to embrace individual rights with a force that surprised their New Deal forbearers.<sup>74</sup> Indeed, by the end of the 1960s, the Warren Court's rights-based jurisprudence defined the very core of liberalism. In subject after subject, a focus on individual rights came to dominate policy discussion. Doctrines that developed regarding freedom of expression, criminal procedure, racial discrimination, conscientious objection, welfare rights, and due process protections from government action (as typified by Reich's work) were legal analogues to a broader social emphasis on leaving individuals alone to find their own place in the world that became central to progressive thought in the 1960s.<sup>75</sup> Thus, because the left had joined the right in its suspicion of the state and its glorification of individual liberty, there were few people left to defend the robust New Deal state. As historian Jefferson Cowie has written, "[i]n many ways, the 1960s celebrations of the social individual made the 1980s celebration of the economic individual possible."<sup>76</sup> The left lost control of the ideas of individual liberty and freedom that it had deployed in the 1960s to great emancipatory effect. Instead, as legal historian William Nelson put it, "the ideal of liberty and freedom" became "rampantly triumphant" in a manner that promoted entrepreneurial wealth maximization even as it weakened the legal and bureaucratic institutions that spread the wealth around.<sup>77</sup>

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<sup>74</sup> Kalman, *The Strange Career of Legal Liberalism*, 22-42. For an early, heart-felt, and forceful statement of dismay see *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 646-71 (1943) (Frankfurter, J., dissenting).

<sup>75</sup> Kalman, *The Strange Career of Legal Liberalism*, pp. 42-59; Patterson, *Grand Expectations*, 562-92; Brick, *Age of Contradiction*, 69-70, 115-17; William E. Nelson, *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920-1980* (Chapel Hill, N.C.: University of North Carolina Press, 2001), 271-326; Mark Tushnet, "The Rights Revolution in the Twentieth Century," in Michael Grossberg and Christopher Tomlins, eds., *The Cambridge History of Law in America* (New York: Cambridge University Press, 2008), 377-402.

<sup>76</sup> Jefferson Cowie, *The Great Exception: The New Deal and the Limits of American Politics* (Princeton, N.J.: Princeton University Press, 2016), 27.

<sup>77</sup> Nelson, *The Legalist Reformation*, p. 368. Reuel Schiller, "From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength," *Berkeley Journal of Employment and Labor*

This commitment to libertarian individualism was not the New Governances' only attribute that had its origins primarily on the left. Its emphasis on information transparency and disclosure, for example, stemmed from liberal reform efforts of the 1950s and 1960s. The Fair Packaging and Labeling Act and the Truth-in-Lending Act, enacted into law in 1966 and 1968, respectively, were premised on the notion that providing consumers with information about loans and consumer products would steer companies toward providing better products. This strategy had its genesis within the heart of Great Society liberalism (Senators Philip A. Hart, Paul Douglas, and William Proxmire), prodded along by postwar left-wing trouble-makers like Vance Packard and Ralph Nader. The Freedom of Information Act (FOIA), passed in 1966, and the National Environmental Protection Act (NEPA), signed into law in 1970, were similarly based on the premise that disclosure of information – about governmental behavior or about the environmental impacts of government action – could limit and channel that behavior without placing substantive restrictions on it. FOIA and NEPA's ideological origins were more mixed than those of consumer-oriented disclosure laws. Both initially attracted Republican and conservative Democratic support because both were seen as weapons in the institutional battle for power between Congress and the President. Yet, by the time FOIA and NEPA came to full fruition, they had been shaped primarily by politicians at the liberal end of the Democratic party, Edmund Muskie and Edward Kennedy, in particular.<sup>78</sup>

Similarly, as historians Thomas Frank, Art Kleiner, Olivier Fraysse, and Mary Britton King, and communications scholar Fred Turner have demonstrated, many of the New

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*Law* 20 (1999): 1; Nelson Lichtenstein, *State of the Union: A Century of American Labor* (Princeton, N.J.: Princeton University Press, 2002), 178-211.

<sup>78</sup> Schudson, *The Rise of the Right to Know*, 28-102, 180-227. For the history of the Freedom of Information Act, also see Schiller, "Enlarging the Administrative Polity," 1444-46.

Governance's other ideas also came from the 1960s left.<sup>79</sup> Consider, for example, the intellectual provenance of *Reinventing Government*. Osborne and Gaebler were explicit about their influences. Primus inter pares was the iconoclastic mid-century management thinker, Peter Drucker. Also listed were two other management gurus, Tom Peters and Robert Waterman, the public policy scholar (and Clinton Administration Secretary of Labor) Robert Reich, and futurist Alvin Toffler.<sup>80</sup> This was hardly the editorial board of the *National Review* or a membership list for Friedrich Hayek's Mont Pelerin Society. Instead, as Turner, Frank, Fraysse, Kleiner, and King have shown, these thinkers were directly connected with counterculture and New Left beliefs.

Each of these scholars traces different links. Turner describes the connections between countercultural communards and the emerging technology culture of the Bay Area in the 1960s and 1970s on the one hand, and the digital utopian, libertarian business thinkers of the 1980s and 1990s. (Many of them, it turns out, were the same people.) Frank demonstrates that the counterculture's beliefs – rejecting conventional, corrupt institutions in order to promote individual freedom and self-actualization – permeated the advertising industry in the 1960s. It was not just hippies who rejected the mechanistic business strategies of the man in the gray flannel suit. It was an entire generation of young people in the business community as well. Indeed, Kleiner illustrates this phenomenon through a series of biographical sketches, telling the

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<sup>79</sup> Fred Turner, *From Counterculture to Cyberculture: Stewart Brand, the Whole Earth Network, and the Rise of Digital Utopianism* (Chicago, Ill.: University of Chicago Press, 2006); Thomas Frank, *The Conquest of Cool: Business Culture, Counterculture, and the Rise of Hip Consumerism* (Chicago, Ill.: University of Chicago Press, 1997); Art Kleiner, *The Age of Heretics: Heroes, Outlaws, and the Forerunners of Corporate Change* (San Francisco, Ca.: Jossey-Bass, 2008); Mary Britton King, "Make Love, Not Work: New Management Theory and the Social Self," *Radical History Review* 76 (2000): 15-24; Olivier Fraysse, "How the U.S. Counterculture Redefined Work for the Age of the Internet," in Olivier Fraysse and Mathieu O'Neil, *Digital Labor and Prosumer Capitalism* (London: Palgrave, 2005).

<sup>80</sup> Osborne and Gaebler, *Reinventing Government*, xi.

stories of dozens of young business managers in the 1960s and 1970s who found success by replacing Taylorite, hierarchical business practices with flexible, humanized, democratic practices with their origins in “Eastern and Western spiritual traditions, in the new types of engineering and social science practice, in humanistic psychology and role-playing theory, in the experiences of anti-Nazi resistance fighters, in the models of systems engineers, and in the counterculture of the 1960s.”<sup>81</sup> (One of these people, Edward Dulworth, ended up working for Al Gore on the National Performance Review.)<sup>82</sup> King’s approach to linking new managerial thinking to the 1960s left is textual. She demonstrates that both the language and the substantive recommendations of the emergent managerial literature of the 1980s (including works by New Governance progenitors Peter Drucker and Tom Peters) have their origins in “countercultural and New Left themes of non-instrumental work, participatory democracy and collective leadership.”<sup>83</sup>

Accordingly, the anti-hierarchical, individualist assumptions of the New Governance’s proponents represented not a conservative takeover of the theoretical underpinnings of public administration. Instead, they reflected a much more broadly held conception of how society should function that stemmed in part from liberal, progressive, and radical reform movements of the 1960s.<sup>84</sup> The New Governance was thus not simply a mode of governance for fiscally tough

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<sup>81</sup> Kleiner, *Age of Heretics*, 13.

<sup>82</sup> *Id.*, 83

<sup>83</sup> King, “Make Love, Not Work,” 18.

<sup>84</sup> As Maurice Isserman and Michael Kazan have noted, the political and cultural efforts of the New Left and the Counterculture only appeared to have floundered at the end of the 1960s. “[I]t is striking that while ‘nothing’ was accomplished by the New Left, everything was different afterwards.” Isserman and Kazan, “The Failure and Success of the New Radicalism,” 214. “The ambiance of our lives,” they wrote was affected by the 1960s, including “a vigorous libertarian spirit.” *Id.*, 229. What we must now realize is that, contrary to the political implications of Isserman and Kazan’s piece, that “ambiance” and “libertarian spirit” has given rise to a modern conception of regulation that is not particularly progressive.

times, or a clever way to break the Republican Party's monopoly on Ronald Reagan's appealing anti-statist rhetoric. It also reflected the growth of a world view that rejected postwar liberalism's conception that public policy should be created by expertise-driven governmental institutions that regulated the interaction between social phenomena (capitalist political economy, for example) and people. Instead, the emergent political culture focused with laser-like intensity on the rights and freedoms of individuals. For all its salutary effects, the successes of the progressive left in the 1960s elevated individual autonomy over social and institutional concerns in the public mind. Taken to its extreme, this focus on the individual corroded the state. The emergent regulatory thinking of the new millennia was a vision of regulation designed for such a state.

Thus, the New Governance was a regulatory strategy that comported with how society increasingly conceived of itself as the new millennium began. Historian Daniel Rodgers described this post-New Deal Order as the "Age of Fracture": a time in which people were conceived of not as social beings, embedded in and affected by the institutions of society, but instead as atomized actors in a society that was nothing more than a market. In discipline after discipline, society "thinned out."<sup>85</sup> Economists, political scientists, philosophers, legal thinkers, and theorists of race and gender, regardless of their position on the political spectrum, portrayed a society in which unifying institutions (the state, the church) and unifying beliefs (Marxism, feminism, racial egalitarianism) faded in importance. Instead, the actions of disparate individuals collectively defined the direction of social change, unmediated by institutions and unconstrained by historical context.

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<sup>85</sup> Daniel T. Rodgers, *The Age of Fracture* (Cambridge, Ma.: Harvard University Press, 2011), 3, 5, 76. Social critic Ian MacDonald articulates a particularly dyspeptic version of this conception of modernity in his brilliant, caustic introduction to *Revolution in the Head: The Beatles' Records and the 1960s* (Chicago, IL.: Chicago Review Press, 3<sup>rd</sup> edition, 2007), 27-37.

Rodgers, writing as an intellectual historian, described how these academics, policy makers, and public intellectuals viewed their society. Sociologists writing at the same time argued that this was an accurate picture. Robert Putnam described the decay of social organizations in his best-selling book *Bowling Alone: The Collapse and Revival of American Community*.<sup>86</sup> (The “Revival” was aspirational.) Others, such as Richard Sennett and Ulrich Beck described the increasing “individuation” of society. According to both of these sociologists, the dissipation of the New Deal regulatory impulse and the withering of the already stingy welfare state led to a society in which “risk . . . is no longer meant to be the province only of venture capitalists or extraordinarily adventurous individuals.” Instead it was “woven” into everyday life. “Schumpeter’s entrepreneur served up as an ideal Everyman.”<sup>87</sup> As a result, simply to survive, individuals were “compelled to understand everything and to dare everything.”<sup>88</sup> That is a perfect epigram for regulation after the decline of the New Deal Order, for it had similar attributes. By relying on people’s participation in markets, or their self-protection aided only by disclosure, it envisioned a world in which risk and externalities were regulated by the independent decision-making of thousands of individual actors. The state had shrunk, pushed aside by a faith in markets to solve every problem.

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<sup>86</sup> Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Touchstone, 2001).

<sup>87</sup> Richard Sennett, *Corrosion of Character: The Personal Consequences of Work in the New Capitalism* (New York: W.W. Norton, 1998), 31, 80

<sup>88</sup> Ulrich Beck and Elisabeth Beck-Gernsheim, *Individualization: Institutionalized Individualism and its Social and Political Consequences* (London: Sage, 2002), 180.



So this is what the regulatory state has come to look like after the decline of the New Deal Order. The institutions of postwar liberalism have not disappeared. The United States still has an enormous administrative state, much of which was formed during the New Deal and the successive generations of reform. Yet, increasingly, these institutions do not operate the way they used to. Following the dictates of the New Governance, they have pulled back. They do not order. They negotiate, persuade, and advise. They do not tax. They charge customers for services. Most significantly, they are much less suspicious of markets. Instead, they use markets, and encourage (and sometimes require) individuals to enter these markets, trusting that market pressures can promote regulatory goals with minimal impact on individual autonomy. The United States is moving towards a vision of public administration that comports with its emergent political culture: a culture that assumes a fragmented society of individuals where each person acts as his own regulator in a grand market of risk and reward.